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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALESSANDRO LUIGI SPADINI, MELISSA IVA KATZ,
DAVID ROBERT WILLIAMS, MARCINA SICILIANO,
EVAN HILLMAN, ANDRE PULEO,
and MEGAN KATHLEEN HURLEY

Appeal 2010-004813
Application 10/730,709
Technology Center 1600

Before DONALD E. ADAMS, MELANIE L. McCOLLUM, and
STEPHEN WALSH, *Administrative Patent Judges*.

WALSH, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This is an appeal under 35 U.S.C. § 134(a) involving claims to a skin care packaged product. The Patent Examiner rejected the claims on the

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

ground of obviousness. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Claims 1-6, 8-12, 14, 15 and 18, which are all the pending claims, are on appeal. Claim 1 is representative and reads as follows:

1. A skin care or cleansing packaged product, comprising:
 - a. a container having a first chamber and a second chamber, each chamber having an outlet;
 - b. a composition contained in the first chamber having a dispersed phase including a first and a second component, the first component being capable of chemically reacting with the second component that is different from the first;
 - c. a continuous phase present in the composition composed of a substantially anhydrous carrier contained in the first chamber;
 - d. an organophilic particle stabilizer contained in the dispersed phase;
 - e. water contained in the second chamber;
 - f. wherein the first component is substantially unsolvated in the carrier; and
 - g. wherein the first and second components do not substantially react with water or each other until dispersed or dissolved in water during cleansing and skin treatment by a consumer.

The Examiner rejected the claims as follows:

- claims 1-4, 12, 14, 15 and 18 under 35 U.S.C. § 103(a) as unpatentable over Lentini,² Farrell³ and Guilbeaux⁴;

² US Patent No. 6,177,092 B1, issued to Peter J. Lentini et al., Jan. 23, 2001.

³ US Patent No. 6,063,390, issued to Linda Farrell et al., May 16, 2000.

⁴ US Patent No. 4,929,644, issued to Ronald D. Guilbeaux, May 29, 1990.

- claims 10 and 11 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Gentile⁵;
- claims 5, 6 and 8 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Hall⁶; and
- claim 9 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Pettengill⁷.

Appellants' arguments are directed to the patentability of only claim 1, and Appellants contest the rejections relying on Gentile, Hall, and Pettengill by relying on those arguments. We select claim 1 as representative for deciding this appeal. 37 C.F.R. § 41.37(c)(1)(vii).

OBVIOUSNESS

The Issue

The Examiner's position is that Lentini described a self-foaming skin cleansing system with anhydrous bicarbonate and acid compositions dispensed from separate packages or chambers, and added to water to produce an effervescent composition. (Ans. 4.) Farrell described an effervescent skin cleansing mixture of bicarbonate and acid in intimate contact. (*Id.*) The Examiner reasoned that it would have been obvious to combine Lentini's anhydrous bicarbonate and acid in the same chamber because Farrell disclosed that the two components do not react in a dry, i.e. anhydrous, state. (*Id.* at 6.) The Examiner also reasoned that it would have

⁵ US Patent No. 6,161,729, issued to James Louis Gentile et al., Dec. 19, 2000.

⁶ US Patent No. 5,316,054, issued to William G. Hall, May 31, 1994.

⁷ US Patent No. 5,020,694, issued to Edwin R. Pettengill, Jun. 4, 1991.

been obvious to add Guilbeaux's organophilic clays to provide thickening, i.e. superior rheological properties, and biocidal activities that could be "tailored to the desired level for a given organic composition." (Ans. 5.)

Appellants contend that a proper prima facie case was not made because the combined teachings of Lentini, Farrell and Guilbeaux "fail[] to disclose a first component in a dispersed phase capable of chemically reacting with a second component and wherein both the first and second components are contained in the first chamber, (i.e., a single chamber)." (App. Br. 7.) As Appellants interpret Lentini, Lentini's components are "maintained in separate containers or separate compartments in the same container" (*id.* at 7), and Lentini's "sachet" should be understood to have physically separate packages or chambers (*id.* at 8). Appellants find that Farrell teaches that the blend of bicarbonate and acid "must be an anhydrous dry powder ostensibly to avoid any premature reaction prior to the user applying the later wetted wiping article to the skin (col. 1, lines 40-41)" (*id.* at 8), and "teaches away from reducing the degree of intimate contact of the dry reactive materials by suspending them in the anhydrous carrier required in instant claim 1(c)" for "the production of 'copious' lather" (*id.*) Appellants contend that "the skilled person would not combine Farrell, et al.'s teaching of an intimate quick reacting mixture with Guilbeaux's organic clays for the reasons stated above regarding quick reaction to produce copious lather." (*Id.*)

The issues with respect to this appeal are:

does the combination of Lentini, Farrell, and Guilbeaux disclose or suggest a first component in a dispersed phase capable of chemically

reacting with a second component, with both the first and second components contained in a first chamber;

did Farrell “teach away” from using Lentini’s carrier; and

did Farrell “teach away” from adding Guilbeaux’s organic clays?

Findings of Fact

We adopt the Examiner’s findings.

Principles of Law

A rejection for obviousness must include “articulated reasoning with some rational underpinning to support the legal conclusion.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007), quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). The proper question to ask is whether a person of ordinary skill in the art, facing the wide range of needs created by developments in the field of endeavor, would have seen a benefit to combining the prior art teachings. *KSR*, 550 U.S. at 424; *see also In re Fulton*, 391 F.3d 1195, 1200 (Fed. Cir. 2004) (the desirability of the combination may arise from nature of the problem, teachings of references, or the ordinary knowledge of those skilled in the art). “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 550 U.S. at 416.

“The prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed.” *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

Analysis

First, we agree with the Examiner that Lentini taught dispersing the bicarbonate and the acid component in non-aqueous solutions for use in anhydrous products, see Ans. 5, citing col. 3, ll. 38-53, and we agree the evidence supports that finding. Those cited lines include Lentini's disclosure that "the present invention may be in the form of a sachet containing the components of the system that is added to a bath of water." Appellants argue that a person of ordinary skill would have understood sachet to be a unitary package with chambers separately containing each of the acid and bicarbonate, not one chamber containing both reactants. Even if the skilled person reading only Lentini would have had that understanding, we agree with the Examiner that Farrell's disclosure of a single pouch containing both reactants in anhydrous form suggested combining both anhydrous formulations in one chamber.

Next, we do not agree that Farrell taught away from using Lentini's anhydrous carrier. Appellants argue that "the skilled person would not have been motivated to reduce the intimate contact of the dry powder in Farrell . . . by suspending such powder in an inert medium." (App. Br. 8.) Appellants provide no evidence to support the argument, and we see none in our review of Farrell. In fact, all of Farrell's working examples include multiple components likely to "reduce the intimate contact" of the reactive bicarbonate and acid. *See* Farrell, cols. 7-9. We find that Farrell did not discourage a person of ordinary skill in the art from mixing the reactive components and dispersing them in an anhydrous continuous phase. For the same reasons, we find that Farrell did not "teach away" from adding Guilbeaux's organic clays, and we agree with the Examiner that the

thickening and biocidal activity could have been adjusted by a person of ordinary skill in the art. *See Fulton*, 391 F.3d at 1201.

CONCLUSIONS

The combination of Lentini, Farrell, and Guilbeaux suggested a first component in a dispersed phase capable of chemically reacting with a second component, with both the first and second components contained in a first chamber.

Farrell did not teach away from using Lentini's anhydrous carrier.

Farrell did not teach away from adding Guilbeaux's organic clays.

SUMMARY

We affirm the rejection of claims 1-4, 12, 14, 15 and 18 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell and Guilbeaux.

We affirm the rejection of claims 10 and 11 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Gentile.

We affirm the rejection of claims 5, 6 and 8 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Hall.

We affirm the rejection of claim 9 under 35 U.S.C. § 103(a) as unpatentable over Lentini, Farrell, Guilbeaux and Pettengill.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

alw

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